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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Claim for Additional Overtime Compensation]

FILE: B-196550

DATE: June 5, 1980

MATTER OF: William C. Rogers - Compensation for
Overtime - Regularly Scheduled v.
Administratively Uncontrollable

DIGEST:

Customs Patrol Officer had tour of duty from 8 a.m. to 4 p.m. and was authorized premium pay for irregular, unscheduled overtime under 5 U.S.C. § 5545. He performed callback surveillance duty from 10 p.m. to 3 a.m. on April 27 through 28, 1977, and scheduled surveillance duty from 7 p.m. April 29, to 2:30 p.m. on April 30 (scheduled day off). He is not entitled to payment for regularly scheduled overtime under 5 U.S.C. § 5542 in addition to premium pay since surveillance duty was administratively uncontrollable overtime as it did not occur at such regular intervals as to fall into clear discernible pattern.

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The National Treasury Employees Union, on behalf of the Estate of William C. Rogers, requests reconsideration of Mr. Rogers' claim for additional overtime compensation in connection with his performance of overtime duties in April 1977 as a Customs Patrol Officer with the U.S. Customs Service. The claim was disallowed by our Claims Division on July 16, 1979.

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As a Customs Patrol Officer with the Savannah District, Mr. Rogers was scheduled to work the 8:00 a.m. to 4:00 p.m. shift for the week of April 24 through 30, 1977. On the night of April 28, following completion of his regular tour of duty, Mr. Rogers was called back to work for purposes of participating in a joint surveillance activity involving several law enforcement agencies. Mr. Rogers performed overtime duty in connection with the particular surveillance activity from 10 p.m. to 3 a.m., over April 28, and 29, then from 7 p.m. to 12 p.m. on April 29, and continuously from 12 p.m., to 2:30 p.m. on April 30,

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1977,--which latter date had been originally scheduled as an off-duty day for Mr. Rogers. The total amount of overtime Mr. Rogers worked in connection with the particular surveillance activity was 24-1/2 hours. At the time covered by his claim Mr. Rogers qualified for and was receiving annual premium pay at the rate of 25 per centum annually for administratively uncontrollable overtime. However, Mr. Rogers claimed that the extra duty was under the control of Customs officials and was regularly scheduled. Thus, he contended that he should have received additional overtime compensation at the time and one-half rate.

The question to be resolved is whether the overtime work performed by Mr. Roger's was "regularly scheduled" within the meaning of 5 U.S.C. § 5542, or administratively uncontrollable overtime within the meaning of 5 U.S.C. § 5545(c)(2). If the work was regularly scheduled, Mr. Rogers would be entitled to premium pay for night-work and overtime pay at the time and one-half rate in addition to premium pay.

Section 5545(c)(2) of title 5, United States Code, provides for administratively uncontrollable overtime as follows:

"(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for

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the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position." (Emphasis added.)

This Office has held that the term "regularly scheduled overtime" refers to work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. This is to be distinguished from overtime which is scheduled on a day-to-day or hour-to-hour basis. B-193398, November 27, 1979, 59 Comp. Gen. ____, and decisions cited therein.

The overtime must be scheduled in advance. In this regard we held in 37 Comp. Gen. 1, 3 (1957) that the term "scheduled" in reference to callback overtime under 5 U.S.C. § 912a, now codified in 5 U.S.C. § 5542 (b)(1), meant notification to the employee prior to the beginning of the workweek. However, later decisions have looked to notification 1 to 4 days in advance of the work as sufficient to constitute overtime scheduled in advance under 5 U.S.C. § 5542(a). See 52 Comp. Gen. 319 (1972) and 48 *id.* 334 (1968). Within the context of this evaluative criteria we believe that the 19-1/2 consecutive hours of overtime which Mr. Rogers worked over April 29 and 30, 1977, may be said to have been scheduled in advance.

However, it is not merely sufficient that the overtime be scheduled in advance in order to be considered "regularly scheduled." As noted above, the overtime must also be scheduled to recur on successive days or after specified intervals. While the overtime need not be subject to a fixed hours-of-work schedule, it must nevertheless recur so frequently and at such regular intervals as to fall into a predictable and discernible pattern. This requirement was the basis for our decision in Customs Special Agents, B-191512, October 27, 1978. In that case three Customs Special Agents claimed additional compensation for overtime

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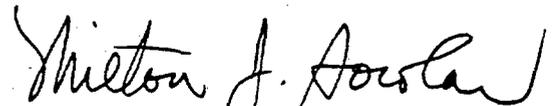
work performed during a surveillance activity in Miami, Florida, from Tuesday, August 2, 1977, through Tuesday, August 9, 1977. In preparation for the 24-hour surveillance activity an informal work roster was prepared in advance by the group supervisor in Miami showing the assignment of each agent for the duration of the surveillance activity. The roster showed that the agents were assigned to designated locations for 12-hour shifts. The agents were also advised that the assignment would last approximately 1 week. We noted that the work was authorized and assigned in advance, and scheduled to recur on successive days at specific 12-hour intervals. The amount of overtime was predictable and followed a discernible pattern. Accordingly, we held that it was "regularly scheduled" work within the meaning of 5 U.S.C. § 5545(c)(2), and the claimants were entitled to overtime compensation at the time and one-half rate as well as premium pay for nightwork.

The circumstances of Mr. Rogers' case are clearly distinguishable from the analysis presented above. In Mr. Rogers' case he was unpredictably called back for 5 hours of additional duty over the 28th and 29th of April 1977. Mr. Rogers was then required to work 19-1/2 hours of overtime duty from 7:00 p.m. on April 29th, through 2:30 p.m. on April 30, 1977. The overtime duty did not show a predictable and discernible pattern. And this is true even though Mr. Rogers was duly authorized in advance to perform overtime duty on the 29th and 30th of April 1977. Further, although the surveillance project was planned and coordinated through several law enforcement agencies, that fact alone does not require a finding that Mr. Rogers' overtime duty was arranged in advance so as to be "regularly scheduled" within the meaning of 5 U.S.C. § 5545(c)(2). Rather, Mr. Rogers' overtime duties appear to have been scheduled on a day-to-day evaluation of the special needs occasioned by the surveillance project, with the amount of irregular overtime varying with no discernible pattern. Accordingly, we conclude that

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Mr. Rogers' overtime duty in these circumstances was not "regularly scheduled" work within the meaning of 5 U.S.C. § 5545(c)(2), and Mr. Rogers is not entitled to overtime compensation at the time and one-half rate authorized by 5 U.S.C. § 5542.

In view of the above, the disallowance of Mr. Rogers' claim by our Claims Division is affirmed.



For the Comptroller General
of the United States